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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 44.

HEMAN MARION SWEATT, *Petitioner*,

v.

THEOPHILUS SHICKEL PAINTER ET AL.

On a Writ of Certiorari to the Supreme Court of the State of Texas.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

THOMAS I. EMERSON
JOHN P. FRANK
ALEXANDER H. FREY
ERWIN N. GRISWOLD
ROBERT HALE
HAROLD HAVIGHURST
EDWARD LEVI

FOR THE COMMITTEE OF LAW TEACHERS AGAINST SEGREGATION IN LEGAL EDUCATION

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

STATEMENT

This is a brief of amici curiae in support of petitioner on a writ of certiorari to review the judgment of the Texas Court of Civil Appeals (R. 465) affirming a judgment of the District Court of Travis County denying petitioner's request for a writ of mandamus (R. 438-41). Review was denied by the Texas Supreme Court (R. 466). Certiorari was granted by this Court on Nov. 7, 1949. The jurisdictional details are contained in petitioner's brief, and the procedural history of the case appears at R. 438-72.

This brief is filed, with the consent of the parties, on behalf of the Committee of Law Teachers Against Segregation in Legal

Education, an organization identified more fully in Appendix A to this brief.

The essential facts are as follows:

The courts below have denied petitioner's application for a writ of mandamus to compel the appropriate officials of the University of Texas to admit him to its law school in Austin, Texas. He is concededly in all respects qualified for admission to that school except for the disqualification of race, for Texas bars Negroes from this University (R. 425, 445). The courts below have rejected petitioner's contention that this exclusion and petitioner's consequent relegation to a state "colored law school" violate his rights under the Fourteenth Amendment.

At the time the record below was made, the colored school was located in Austin, Texas. It has since been moved to Houston (see R. 51-2; Bulletin of the Texas State University for Negroes, School of Law 5 (1949-50)). Petitioner contends that, for the decision of the issues on which he petitions, the location is immaterial except in one important respect: The use of the University of Texas (white) faculty members was contemplated while the school was in Austin (R. 454), but a separate faculty is to be recruited for Houston (R. 28-9; see Bulletin, *supra*, at p. 4).

The Texas law school (colored) was set up in response to the order of the district court at an earlier stage of this same litigation (R. 424-33), and it does not appear in the record that there have ever actually been any students in it (though doubtless there are some), either in Austin or in Houston. Sweatt was the first Negro to apply for admission to the Texas law school (white) (R. 451); and in any case Texas concedes that the colored school will have very few students (R. 77).

SUMMARY OF ARGUMENT

The basic position of this brief is that segregated legal education in the state institutions of Texas violates the equal protection clause of the Fourteenth Amendment. That position is approached by three different paths.

First, analysis of the origins of "equal protection" in American law shows that, in the form of "equality before the law," it was transferred to this country from the French by Charles Sumner as part of his attack on segregated education in Massachusetts a decade before the Civil War, and linked by him with the Declaration of Independence. Popularized by Sumner, it or like phrases became the slogan of the abolitionists, and it passed into the Constitution as an important part of the abolitionists' share of the Civil War victory. Congress, contemporaneously with the adoption of the Fourteenth Amendment, clearly understood that segregation was incompatible with equality, a judgment reflected by this Court in *Railroad Co.* v. *Brown*, 17 Wall. 445 (1873).

In *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), this Court abandoned the original conception of equal protection, adopting instead the legal fiction that segregation (in that case, in transportation) is not discriminatory. This was a product, in part at least, of a policy judgment that the judiciary was incapable of enforcing the Amendment as it was written, and that the underlying social evil must be left to the correction of time. The Court erred on both counts: the judiciary is not so powerless as it supposed, and the results of its abdication have been disastrous. The dissenting views of Mr. Justice Harlan in the *Plessy* case were correct, and should be adopted now.

Second, we challenge the applicability to education of the "separate but equal" refinement of the equal protection clause. While we grant the existence of troublesome dicta, there is neither a holding nor even carefully considered dicta by this Court declaring that segregation may be enforced in any phase of education. In *Plessy* v. *Ferguson* the Court did not say that segregation was valid in every context in which men could devise ways of separatting themselves by color. On the contrary, it made careful distinction between reasonable and unreasonable segregation. We contend that segregation in education is for this purpose unreasonable.

Third, even within the broadest application of *Plessy* v. *Ferguson*, petitioner is entitled to absolute equality in education.

For reasons set forth in detail in the body of the brief, it is impossible for petitioner to receive at the improvised colored law school a legal education equal to that offered at the well-known University of Texas law school (white). Nor, indeed, can segregated legal education ever afford equal facilities.

ARGUMENT

I.

THE EQUAL PROTECTION CLAUSE WAS INTENDED TO OUTLAW SEGREGATION.

The Court below held (a) that segregated legal education can meet the constitutional standard, and (b) that Texas (colored) in fact did so. We challenge at the outset the entire basis of any decision which assumes that segregation can meet the standard of the Constitution. The Negro for whom the first section of the Fourteenth Amendment was primarily adopted was largely read out of that Amendment by nineteenth century decisions.[1] The time has come to reconsider the frustration of so much of section one of the Amendment as relates to the equal protection of the laws.

Society in the past has known intermediate stages of bondage between the free and the slave. In antiquity, "between men of these extremes of status stood social classes which lived outside the boundary of slavery but not yet within the circle of those who might rightly be called free."[2] The Thirteenth Amendment took the Negroes out of the class of slaves. Section one of the

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[1]While decisions outside the area of segregation are not directly involved in this case, the leading segregation decision of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), can be understood only as part of a group of decisions in the latter part of the nineteenth century narrowly construing the capacity of the Fourteenth Amendment to protect Negro rights. Other decisions include the *Civil Rights Cases*, 109 U.S. 542 (1883), and *United States* v. *Harris*, 106 U.S. 629 (1883).

[2]Westermann, *Between Slavery and Freedom*, 50 Am. Hist. Rev. 213, 214 (1945).

Fourteenth Amendment was intended to insure that they not be dropped at some half-way house on the road to freedom. It sought to bring the ex-slaves within the circle of the truly free by obliterating legal distinctions based on race.

The evidence of intent to eliminate race distinctions in transportation and education, relationships which must be considered together in the history of equal protection, is particularly clear. Equal protection first entered American law in a controversy over segregated education.

1. The original meaning of equal protection is incompatible with segregated education.

It was one thing, and a very important one, to declare as a political abstraction that "all men are created equal," and quite another to attach concrete rights to this state of equality. The Declaration of Independence did the former. The latter was Charles Sumner's outstanding contribution to American law.

The great abstraction of the Declaration of Independence was the central rallying point for the anti-slavery movement. When slavery was the evil to be attacked, no more was needed. But as some of the New England States became progressively more committed to abolition, the focus of interest shifted from slavery itself to the status and rights of the free Negro. In the Massachusetts legislature in the 1840's, Henry Wilson, wealthy manufacturer, abolitionist, and later United States Senator and Vice President, led the fight against discrimination, with "equality" as his rallying cry.[3] One Wilson measure gave the right to recover damages to any person "unlawfully excluded" from the Massachusetts public schools.[4]

Boston thereupon established a segregated school for Negro children the legality of which was challenged in *Roberts* v. *City of Boston*, 5 Cush. (Mass.) 198 (1849). Counsel for Roberts

[3]For an account of Wilson's struggles against anti-miscegenation laws, against separate transportation for Negroes, and for Negro education, see Nason, *Life of Henry Wilson*, 48 et seq. (1876).

[4]Mass. Acts 1845, c. 214.

was Charles Sumner, scholar and lawyer, whose resultant oral argument was widely distributed among abolitionists as a pamphlet.[5] Sumner contended that separate schools violated the Massachusetts state constitutional provision that "All men are created free and equal."[6] He conceded that this phrase, like its counterpart in the Declaration of Independence, did not by itself amount to a legal formula which could decide concrete cases. Nonetheless it was a time-honored phrase for a time-honored idea and, in a broad historical argument, he traced the theory of equality from Herodotus, Seneca and Milton to Diderot and Rousseau, philosophers of eighteenth century France.

At this point Sumner made his major contribution to the theory of equality. He noted that the French Revolutionary Constitution of 1791 had passed beyond Diderot and Rousseau to a new phrase: "Men are born and continue free and equal *in their rights.*" Using a popular French phrase in English for the first time, Sumner referred to "egalité devant la loi," or *equality before the law.* The conception of equality before the law, or equality "in their rights," was a vast step forward, for this was the first occasion on which equality of rights had been made a legal consequence of "created equal."

Equality before the law, or equality of rights, Sumner insisted, was the basic meaning of the Massachusetts constitutional provision. Before it "all . . . distinctions disappear." Man, equal before the law, "is not poor, weak, humble, or black; nor is he Caucasian, Jew, Indian, or Ethiopian; nor is he French, German, English, or Irish; he is a MAN, the equal of all his fellow men."[7] Separate schools were unconstitutional because they made a distinction where there could be no distinction, at the point of race, and therefore separate schools violated the principle of equality before the law.

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[5]Among those active in distributing the pamphlet was Salmon P. Chase of Ohio. *Diary and Correspondence of Salmon P. Chase,* Chase to Sumner, Dec. 14, 1849, in 2 Ann. Rep. Am. Hist. Ass'n. 188 (1902).

[6]The following summary of argument is taken from the complete argument reprinted in 2 Sumner *Works* 327 et seq. (1874).

[7]*Ibid.*

The Massachusetts court, unpersuaded, rejected Sumner's argument, and was in turn reversed by the state legislature.[8] But the argument outlasted the case, and from it the phrase "equality before the law," or its briefer counterpart, "equal rights," became the measuring stick for all proposals concerning freedmen.

Prior to the Civil War, the controversy over equality for the freedmen was primarily a dispute within the States, but national emancipation brought the issue to Congress where Sumner kept "equality" in the forefront of Congressional attention.[9] Shortly before the first meeting of the 39th Congress in December, 1865, the new Black Codes in the Southern States had shocked the North into widespread recognition of the need to secure equality.[10] Sumner's popularization of his equality theory had been so successful that its echo returned from Radicals everywhere.[11] Representative Bingham of Ohio offered a proposed Fourteenth Amendment in which the key phrase was a guarantee to the people of "equal protection in their rights, life, liberty, and property."[12] Senator Morrill of Vermont, shortly to be a member of the Joint Committee on Reconstruction, sent a note to Sumner suggesting that the best "jural phrase" for an amendment would be a guarantee that citizens are "equal in their civil rights, immunities and privileges and equally entitled to protection in life,

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[8]Mass Acts 1855, c. 256.

[9]See, *e.g.*, his discussion in the Senate of the possible wisdom of including "equality" in the Thirteenth Amendment. Cong. Globe, 38th Cong., 1st Sess. 1482 (1864).

[10]Handy compilations of these Codes are McPherson, *Handbook of Politics for 1868*, 29-44 (1868); 1 Fleming, *Documentary History of Reconstruction* c. 4 (1906).

[11]"Equality before the law" was the general cry. A Pennsylvania State Equal Rights League signed its correspondence "Yours for justice and equality before the law." Letter to Stevens of Nov. 1, 1865, *Stevens Mss.* (1865), Lib. Cong. And see resolution of Providence, R. I., Union League Club, *ibid*, asking "our members in Congress" to secure "equal rights of all men before the law." "Absolute equality before the law" was demanded in Grosvenor, 24 New Englander 268 (1865). See also James, *The Framing of the Fourteenth Amendment* 29 et seq. (1939), an unpublished Ph.D. thesis in the library of the University of Illinois. On the relative amount of attention given the first, as compared to the other sections of the Amendment, see note 22 *infra*.

[12]Cong. Globe, 39th Cong., 1st Sess. 14 (1865).

liberty and property."[13] Sumner himself introduced a reconstruction plan, an important part of which included "equal protection and equal rights."[14]

The first relevant measure actually to be considered by Congress was the bill which became the Civil Rights Act of 1866. This bill was originally introduced by Senator Wilson of Massachusetts, the same Wilson who had been so active earlier in the equality struggles in that state,[15] and we may assume that the proposal represented the joint policies of Wilson and Sumner.[16] The Wilson proposal invalidated all laws "whereby or wherein any inequality of civil rights and immunities" existed because of "distinctions or differences of color, race or descent." This measure, as it passed the Senate, contained a clause forbidding any "distinction of color or race" in the enforcement of certain laws, and assured "full and equal benefit of all laws" relating to person and property. Senator Howard, a member of the Joint Committee on Reconstruction, said of the Act, "In respect to all civil rights, there is to be hereafter no distinction between the white race and the black race."[17]

The Civil Rights bill was enacted, but over the protest of one extreme radical in the House. Representative Bingham of Ohio opposed the measure on the ground that the Thirteenth Amendment gave it an inadequate base. He preferred to wait until

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[13]Morrill to Sumner, undated, prob. Oct. or Nov., 1865, in *Sumner Mss.*, quoted in James, *supra* note 11 at 31.

[14]10 Sumner, *Works* 22 (1874).

[15]Though the measure was introduced by Wilson, actual leadership on the proposal passed from him to Senator Trumbull of Illinois, chairman of the Judiciary Committee. The proposal originated with S.9 in the 39th Cong., introduced by Wilson, from which the text quotations are taken. A few days later, after floor discussion which revealed that Trumbull was willing to take the lead on the measure, Cong. Globe, 39th Cong., 1st Sess. 43 (1865), Wilson introduced a new bill, S. 55, which retained and enlarged the language of S. 9. This bill was referred to by Trumbull's name but retained Wilson's proposals. S. 61 became the Civil Rights Act of 1866. 14 Stat. 27 (1866).

[16]Wilson hinted as much. Cong. Globe, 39th Cong., 1st Sess. 39 (1865).

[17]*Id.* at 504.

a new Amendment might pass which would eliminate all "discrimination between citizens on account of race or color."[18] As a member of the Joint Committee on Reconstruction, Bingham was then working on just such an Amendment. With fellow Committee members such as those extreme equalitarians Stevens, Howard, and Morrill, there was no serious obstacle in Committee.

Bingham drafted for the Committee the essential language of section one of the Fourteenth Amendment. In the vital equality clause he combined the language of his own earlier proposed amendment, "equal protection in their rights" and the Civil Rights bill language, "equal benefit of all laws" into the concise "equal protection of the laws."[19] The prompt adoption of the Amendment carried the abolitionist theory of racial equality into our basic document.[20] As Senator Howard, floor leader for the Amendment in the Senate, said of the clause, it "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another." The core of the clause he reduced to Sumner's meaning: "It establishes equality before the law . . . ."[21]

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[18] *Id.* at 1290, 1293.

[19] The greatest contribution of the Bingham draft of the clause was not in the words he used, but in those he omitted. Previous proposals had sometimes carried words of qualification as to the particular types of laws as to which equal protection was to be afforded. The Civil Rights bill in the Senate had referred to "equal benefits of all laws and proceedings for the security of person and estate," and had referred to "discrimination in civil rights and immunities." Bingham saw hopeless confusion in these refinements, see remarks cited, *supra* note 18, and omitted them. He thus brought the language squarely into accord with the broad "equality before the law."

[20] We do not, in tracing this history of the phrase "equal protection," overlook sporadic earlier uses of similar language. See, *e.g.*, Mass. Const. Art. III (1780); N. H. Const. Art. VI (1792); and Me. Const. Art. I, § 3 (1819). The context of those Articles, dealing with freedom of religion, are so alien to the subject at hand that they were never referred to in connection with the Fourteenth Amendment.

[21] Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). Some of the broad expressions contemporaneously used, as in the text above, must be read in the light of the fact that it was racial distinctions which were being discussed. Howard, for example, meant not that the Amendment obliterated all classifications in the law, but that it obliterated race as a basis of classification.

Because the primary concern of those who enacted the Fourteenth Amendment was with sections two and three of the Amendment, rather than section one which includes equal protection, we do not have complete evidence of the views of all the responsible men of the time on the meaning of equal protection.[22] We do know that the clause found its way into the Constitution through Sumner, through Wilson, through Trumbull and through the twelve majority members of the Joint Committee on Reconstruction. Of those fifteen at least eight—Sumner, Wilson, Bingham, Howard, Stevens, Conkling, Boutwell, and Morrill—thought the clause precluded any distinctions based on color.[23] Three—Trumbull, Fessenden, and Grimes—had some mental reservations, particularly as to miscegenation, although they agreed generally

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[22]Much of the murkiness in the history of "privileges and immunities," "person," and "due process," as well as equal protection, is produced by the fact that what has become the only significant part of the Amendment was then the least significant part. The Republican Party represented a coalescence of certain economic and political interests, along with the abolitionists. Standard references on the subject are 2 Beard, *The Rise of American Civilization* c. 23 (1935), and 2 Morrison and Commager, *The Growth of the American Republic* c. 1 (1942). The best telling of the manner in which these factions sought to solve their problems by the Fourteenth Amendment is Flack, *The Fourteenth Amendment* (1908). The short of it is that the politicians and the economic interests they represented got the middle sections of the Amendment, while section one was the abolitionists' share of the victory.

[23]The views of Sumner, Wilson, and Howard are apparent from various quotations throughout this brief. Stevens was, if anything, a more extreme equalitarian than the other two. See Miller, *Thaddeus Stevens* 9-43, 404, 405 (1939); and see Cong. Globe, 39th Cong., 1st Sess. 1063, 1064 (1866). The views of Conkling, Morrill, and Boutwell are apparent from their consistent support of the Sumner civil rights bill, discussed in detail, *infra*. The case as to Bingham is less clear, since his pre-occupation in the Amendment was largely with the privileges and immunities clause, his special contribution. Cf. 2 Boutwell, *Reminiscences of Sixty Years* 41 (1902). However, his view was apparently in accord with the others of this group, as evidenced at least by some phrases. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1293 (1866).

with the others.[24] The positions of the remainder we do not know, though some, at least, doubtless agreed with Sumner.[25] It was thus the dominant opinion of the Committee that the clause eliminated distinctions of color in civil rights.

2. Contemporary rejection of "separate but equal" in Congress, immediately before and after the Fourteenth Amendment, represents a judgment incompatible with segregated education.

Congress repeatedly considered "separate but equal" in the Reconstruction decade, particularly in connection with transportation. Railroad and street car companies in the District of Columbia early began to separate white and colored passengers, putting them in separate cars or in separate parts of the same car, with quick Congressional response. As early as 1863, Congress amended the charter of the Alexandria and Washington Railroad to provide that "No person shall be excluded from the cars on account of color."[26] When, in 1864, the Washington and Georgetown street car company attempted to handle its colored passengers by putting them in separate cars, Sumner denounced the practice in the Senate and set forth on a crusade to eliminate street car segregation in the District.[27] After a series of skirmishes, he finally carried to passage a law applicable to all District carriers that "no person shall be excluded from any car on account of color."[28]

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[24]Fessenden and Trumbull believed that the Civil Rights Act and the Amendment did not affect anti-miscegenation legislation. Cong. Globe, 39th Cong., 1st Sess. 505 (1866) (Fessenden); *id.* at 322 (Trumbull). In 1864 Grimes thought segregated transportation was equal. Cong. Globe, 38th Cong., 1st Sess. 3133 (1864), with Trumbull apparently contra on that issue, *id.* at 3132. Whether the views of Grimes changed is not known.

[25]These four members, Harris, Williams, Blow, and Washburne, were conventional radicals and Harris, Blow, and Washburne had very strong anti-slavery backgrounds. It is therefore highly probable that at least some of them shared the views of Sumner and Stevens, but we have no direct evidence.

[26]12 Stat. 805 (1863).

[27]Cong. Globe, 38th Cong., 1st Sess. 553, 817 (1864).

[28]13 Stat. 537 (1865).

The discussion of the street car bills, all shortly prior to the Fourteenth Amendment, canvassed the whole issue of segregation in transportation. Those who supported the measures did so on grounds of equality. Senator Wilson denounced the "Jim Crow car," declaring it to be "in defiance of decency."[29] Sumner persuaded his brethren to accept the Massachusetts view, saying that there "the rights of every colored person are placed on an equality with those of white persons. They have the same right with white persons to ride in every public conveyance in the commonwealth."[30] Thus when Congress in 1866 wrote equality into the Constitution, it did so against a background of repeated judgment that separate transportation was unequal.[31]

The history of equal protection and separate schools, though less clear, suggests a similar interpretation. The close of the War found public education almost non-existent in the South,[32] and Negro school status in the North ranged from total exclusion from schools to complete and unsegregated equality.[33] Four Southern Reconstruction constitutions provided for mixed schools, and the Northern educational aid societies offered unsegregated education in the South.[34] Although these efforts to achieve unsegregated education were of little practical effect, they indicate the intellectual atmosphere from which equal protection emerged. The abolitionists were absolutely confident that the races both could

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[29]Cong. Globe, 38th Cong., 1st Sess. 3132, 3133 (1864).

[30]*Id.* at 1158.

[31]This was clear even from the conservative viewpoint. See remarks of Senator Reverdy Johnson, *id.* at 1156.

[32]One of the many works on the subject is Knight, *The Influence of Reconstruction on Education in the South* (1913).

[33]An extensive account contemporary with Reconstruction, much broader in scope than the title indicates, is *Spec. Rep., Commissioner of Education on Condition and Improvement of Public Schools, Dist. Col.*, H.R. Exec. Doc. No. 315, 41st Cong., 2d Sess. (1870).

[34]Materials are collected in 2 Fleming, *supra* note 10 at 171-212. Even conservative Southerners, when they sought to give full compliance to the Fourteenth Amendment, conceded that equality required unsegregated education. See Williams, *The Louisiana Unification Movement in 1873*, 2 J. South. Hist. 349 (1945), describing the concession of mixed schools by a political group headed by Gen. P. T. Beauregard.

and *should*, under the principle of equality, mingle in the school rooms.[35]

The primary responsibility of Congress for education was in the District of Columbia, where a segregated system was a going operation prior to the end of the Civil War. Securing a place on the District of Columbia Committee, Sumner proceeded to attack discriminations in the District one at a time.[36] Since he chose first to eliminate restrictions on Negro office-holding and jury service, he did not reach the school question on his own agenda until 1870.[37] He then twice carried proposals through the Committee to eliminate the segregation,[38] and urged his proposal on the floor of the Senate on the grounds of equality: "Every child, white or black, has a right to be placed under precisely the same influences, with the same teachers, in the same school room, without any discrimination founded on color."[39]

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[35]The Amendment must be read in the light of this psychology of optimism. Immediately after the War the abolitionist societies undertook educational work in the South on a large scale, fully recorded in such of their journals as *The American Freeman* and the *Freeman's Journal*. The Constitution of the Freeman's and Union Commission provided that "No schools or supply depots shall be maintained from the benefits of which any person shall be excluded because of color." *The Am. Freeman* 18 (1866). Lyman Abbott, General Secretary of the Commission, published a statement explaining that the policy had been fully considered: "It is inherently right. To exclude a child from a free school, because he is either white or black, is inherently wrong: . . . [We must] lead public sentiment toward its final goal, equal justice and equal rights . . . . The adoption of the reverse principle would really lend our influence *against* the progress of liberty, equality, and fraternity, henceforth to be the motto of the republic." *Id.* at 6. The fact is that few whites attended these schools. Boyd, *Some Phases of Educational History in the South since 1865*, Studies in Southern History 259 (1914).

[36]Sumner expounded this seriatim policy in Cong. Globe, 40th Cong., 2nd Sess. 39 (1867).

[37]The jury and office law was twice pocket-vetoed by President Johnson, and Sumner, therefore, had to secure its passage three times before it became effective in President Grant's administration. 16 Stat. 3 (1869).

[38]S. 361, Cong. Globe, 41st Cong., 2nd Sess. 3273 (1870), and S. 1244, *id.* at 1053 et seq.

[39]*Id.* at 1055.

The most important new voice heard in the District of Columbia school debate on Sumner's proposal was that of Senator Matt Carpenter of Wisconsin, a leading constitutional lawyer of his time and prevailing counsel in *Ex parte Garland*, 4 Wall. 333 (1867), *Ex parte McCardle*, 7 Wall. 506 (1869), and the *Slaughter-House Cases*, 16 Wall. 36 (1873). Carpenter said:

> "Mr. President, we have said by our constitution, we have said by our statutes, we have said by our party platforms, we have said through the political press, we have said from every stump in the land, that from this time henceforth forever, where the American flag floats, there shall be no distinction of race or color or on account of previous condition of servitude, but that all men, without regard to these distinctions, shall be equal, undistinguished before the law. Now, Mr. President, that principle covers this whole case."[40]

Filibuster, not votes, stalled the District of Columbia school measure.[41] Sumner thereupon terminated his efforts to clear up discriminations one at a time and determined to make one supreme effort along the entire civil rights front. He put his whole energy behind a general Civil Rights bill, which forbade segregation throughout the Union, in the District of Columbia and outside it, in conveyances, theaters, inns, and schools.[42] The consideration by the Senate of this measure, which in modified form became the Civil Rights Act of 1875, represents an overwhelming contemporary judgment that "separate but equal" schools, wherever located, violate the equal protection clause.

In the debates on this new civil rights bill, the leading cases on which this Court relied in *Plessy* v. *Ferguson* were pressed upon the Senate and rejected as unsound. *Roberts* v. *City of*

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[40]Cong. Globe, 41st Cong., 3rd Sess. 1056 (1871).

[41]By 1872, the filibuster had come into frequent use in the defense against radical legislation. By a vote of 35 to 20 Sumner defeated those who sought to keep his District school measure off the floor entirely, Cong. Globe, 42nd Cong., 2d Sess. 3124 (1872), but his time was used up before he could bring the matter to final vote.

[42]The measure was proposed by Sumner both as a bill and as an amendment to other bills over a period of years. Its final presentation was in the 43rd Cong., S. 1.

Boston, supra, was quoted without avail.[43] A contemporary Ohio decision, *State* v. *McCann*, 21 Ohio St. 198 (1872), which held that separate schools were adequate, was rejected by name before these men who knew the Fourteenth Amendment best.[44] They made the point over and over again that the Amendment forbade *distinctions* because of race. As Senator Edmunds of Vermont, later chairman of the Senate Judiciary Committee, put it when he rejected separate schools: "This is a matter of inherent right, unless you adopt the slave doctrine that color and race are reasons for distinction among citizens."[45] Sumner himself denounced "separate but equal" in the Senate as he had denounced it in his oral argument in *Roberts* v. *City of Boston* years before:

> "Then comes the other excuse, which finds Equality in separation. Separate hotels, separate conveyances, separate theaters, separate schools, separate institutions of learning and science, separate churches, and separate cemeteries—these are the artificial substitutes for Equality; and this is the contrivance by which a transcendent right, involving a transcendent duty, is evaded.
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> . . . Assuming what is most absurd to assume, and what is contradicted by all experience, that a substitute can be an equivalent, it is so in form only and not in reality. Every such attempt is an indignity to the colored race, instinct with the spirit of slavery, and this decides its character. *It is Slavery in its last appearance.*"[46]

The bill started its final road to passage in the 43rd Congress. As Sumner had died, Senator Frelinghuysen of New Jersey led the debate for the bill, beginning on April 29, 1874, with an extensive argument that segregation was incompatible with the Fourteenth Amendment. The bill, he said, sought "freedom from all discrimination before the law on account of race, as one of the

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[43]Cong. Globe, 42nd Cong., 2d Sess. 3261 (1872).

[44]Senator Ferry, opposing the bill, relied on the *McCann* case. *Id.* at 3257. At the time of its final consideration, Senator Frelinghuysen, in charge of the bill in the Senate, explained why he thought the *McCann* case should not control. 2 Cong. Rec. 3452, 43rd Cong., 1st Sess. (1874).

[45]Cong. Globe, 42nd Cong., 2d Sess. 3260 (1872).

[46]Cong. Globe, 42nd Cong., 2d Sess. 382, 383 (1871) (emphasis added).

fundamental rights of United States citizenship."[47] For this he found full warrant in the equal protection clause. Segregation in the schools, he said, could only be voluntary, for "the object of the bill is to destroy, not to recognize, the distinctions of race."[48]

There were in the Senate three distinct views on the problem of segregated schools. A minority thought that "separate but equal" schools should be permitted. On May 22, 1874, an amendment to that effect offered by Senator Sargent of California was rejected, 26 to 21. Those 26 included Morrill, Conkling and Boutwell, who had been on the Committee which had drafted the Amendment. By voting to reject the "separate but equal" school clause, they necessarily indicated a judgment that Congress had power to legislate against segregated schools under the equal protection clause. This contemporary affirmative and deliberate interpretation of the Constitution is entitled to great weight here. *McPherson* v. *Blacker*, 146 U.S. 1, 27 (1892).

The 26 were not themselves of one mind. Senator Boutwell represented a small minority view that separate schools necessarily bred intolerance and therefore should not be allowed to exist even if both races desired it.[49] However, the dominant Senate opinion was that separate schools should be forbidden by law, as the Amendment and this bill forbade them; but that if the entire population were content in particular instances to accept separate schools, it might do so. Senator Pratt of Indiana, one of the most vigorous supporters of the bill, noted that Congress was continuing separate schools in the District of Columbia because both races were content with them; and at the same time he pointed out that where there were very few colored students, they would have to be intermingled.[50] Senator Howe put it most concretely when he observed that if, by law, schools were permitted to be

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[47] 2 Cong. Rec. 3452, 43rd Cong., 1st Sess. (1874).

[48] *Ibid.*

[49] "If it were possible, as in the large cities it is possible, to establish separate schools for black children and for white children, it is in the highest degree inexpedient to either establish or tolerate such schools." From speech of Senator Boutwell, *id.* at 4116.

[50] *Id.* at 4081, 4082.

separate, they would never in fact be equal. He believed in prohibiting separate schools and then letting people do as they chose: "Let the individuals and not the superintendent of schools judge of the comparative merits of the schools."[51]

The bill passed the Senate, but in the House the result was different. The bill passed, but with the school clause deleted.

This deletion was the product of many factors. The House had previously voted to require mixed schools,[52] but on this occasion it was confronted with the firm opposition of the George Peabody Fund. Peabody, an American merchant who founded what became J. P. Morgan & Co., established a fund of $3,000,000 to aid education in the South. As abolitionist education aid societies ran out of money and collapsed, the Peabody Fund became the only major outside agency aiding Southern education. The Fund opposed mixed schools, withdrawing its aid where they were required.[53] It claimed credit for inducing President Grant to instruct his House floor leader to abandon the school provision.[54] Coupled with this pressure were threats from Southern representatives that they would end their newly founded public school systems if the Senate measure passed.[55] In addition, some Representatives felt that the courts would protect the Negroes on the school issue, and thus as a matter of legislative discretion waived the right to legislative aid.[56] For whatever combination

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[51] *Id.* at 4151.

[52] H.R. 1647, Cong. Globe, 42nd Cong., 2d. Sess. 2074 (1872), (House refused, 73 to 99, to lay bill on table); *id.* at 2270, 2271 (engrossed and read three times, 100 to 78); no final action taken.

[53] 2 Fleming, *supra* note 10 at 194. During this period the Fund was under the direction of Dr. Barnas Sears, later succeeded by J. L. Curry. Curry, in a volume on the work of the Fund, introduces the topic of mixed schools with the words, "Some persons, not to 'the manner born', took the lead in organizing a crusade for the co-education of the races." Curry, *Brief Sketch of George Peabody* 60 (1898).

[54] *Id.* at 64, 65.

[55] See, *e.g.*, discussion of this point by Representative Roberts, who stated that he preferred to prohibit segregated schools but would vote to omit the clause for fear the South would abolish all schools. 3 Cong. Rec. 981, 43rd Cong., 2d Sess. (1875).

[56] See remarks of Representative Monroe, *id.* at 997, 998.

of reasons, a leading Negro Representative from South Carolina consented to eliminate the school clause in return for assurance that the rest of the bill would pass.[57] The House result, clearly, thus represented a political rather than a constitutional judgment.

In summary, equal protection as a legal conception originated before the Civil War in Sumner's attack on segregated schools. It became the abolitionist rallying cry and was brought into the Constitution by the abolitionist wing of the Republican Party. Before the Fourteenth Amendment was adopted, "equal rights" was thoroughly understood to mean identical, and not separate rights, particularly in transportation. That was the view of the dominant group among those who actually phrased the Fourteenth Amendment. Throughout the debate on the Amendment its supporters acknowledged no doctrine of equal but separate as an exception to the fundamental concept of equal rights. Contemporary legislative action confirms this basic position.

3. In Railroad Co. v. Brown, this Court early decided that "separate" could not be "equal".

In the leading case of *Railroad Co.* v. *Brown*, 17 Wall. 445 (1873), this Court early decided that separate accommodations, no matter how identical they might otherwise be, were not equal.

On February 8, 1868, Catherine Brown, colored, attempted to board a railroad car on a line from Alexandria to Washington. That road had a "Sumner amendment" in its charter which provided that "no person shall be excluded from the cars on account of color."[58] The railroad maintained two identical cars, one next to the other on the train, using one for white and the other for colored passengers. When Mrs. Brown attempted to sit in the "white" car, she was ejected with great violence.

The pertinent legal issue in Mrs. Brown's case was whether segregation amounted to the same thing as "exclusion from the cars." The episode attracted immediate attention because Mrs.

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[57] See remarks *id.* at 981, 982.

[58] 12 Stat. 805 (1863).

Brown was in charge of the ladies' rest room at the Senate. A Senate investigating committee concluded that the Company had violated its charter, and recommended that the charter be repealed if Mrs. Brown were not fully compensated by civil damages.[59]

At the trial, the Company unsuccessfully asked for a charge to the jury that separate but equal cars complied with the statute, and in the Supreme Court it argued that "making and enforcing the separation of races in its cars" was "reasonable and legal."[60]

The Supreme Court unanimously rejected the "separate but equal" argument as "an ingenious attempt to evade a compliance with the obvious meaning of the requirement."[61] The object of the Sumner amendment, said the Court, was not merely to let the Negroes buy transportation, but to let them do so without "discrimination":

> "Congress, in the belief that this discrimination was unjust, acted. It told the company, in substance, that it could extend its road into the District as desired, but that this discrimination must cease, *and the colored and white race, in the use of the cars, be placed on an equality.* This condition it had the right to impose, and in the temper of Congress at the time, it is manifest the grant could not have been made without it."[62]

Thus in its first review of "separate but equal," this Court held that segregation was "discrimination" and not "equality." We ask the Court to apply that same principle in the instant case.

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[59]Sen. Rep. No. 131, 40th Cong., 2d Sess. (1868).

[60]The quotation is taken from the brief on file in the Supreme Court library.

[61]17 Wall. 445, 452. The same approach as that of the Brown case is taken whenever a statute which requires "equal" treatment is held to forbid segregation. See, *e.g., Baylies* v. *Curry,* 128 Ill. 287, 21 N.E. 595 (1889) (restricting Negroes to particular theater seats held violation of statute); *Jones* v. *Kehrlein,* 47 Cal. App. 646, 194 P. 55 (1920) (same).

[62]17 Wall. 445 at 452, 453 (emphasis added).

4. Plessy v. Ferguson, which undid the Brown case and the legislative history of equal protection, should be overruled.

Twenty years after *Railroad Co.* v. *Brown,* this Court took a wholly different view of segregation.

The exact issue in *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), was whether a Louisiana requirement of separate railroad accommodations denied equal protection. Mr. Justice Brown for the majority held that this segregation did not stamp "the colored race with a badge of inferiority." If it did so, said he, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[63]

Mr. Justice Harlan, dissenting, states our case:

> "It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons . . . .
>
> "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached

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[63] *Plessy* v. *Ferguson,* 163 U.S. 537, 551 (1896).

the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

"In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by the tribunal in the *Dred Scott* case." (163 U.S. at 556-9).

The core of Mr. Justice Brown's argument is in his assumption that segregation is not a white judgment of colored inferiority. This would be so palpably preposterous as a statement of fact that we must assume Justice Brown intended it as a legal fiction. The device of holding a despised people separate, whether by confinement of the Jew to the ghetto, by exclusion of the lowest castes in India from the temples, or by the slightly more refined separate schoolroom, is clearly expression of a judgment of inferiority.

The real question, therefore, is why should the Court have adopted this legal fiction? Why should the Court have thought it necessary to make a pretense that segregation is anything other than discrimination?

The Court chose to overthrow the Fourteenth Amendment, not for caprice, but for reasons of policy.[64] The specific policy judgments made by the Court are analyzed in the next section of this brief. Suffice it to point out here that *Plessy* v. *Ferguson* was part of the process by which the Court in the latter part of the nineteenth century failed to preserve for the Negro many of the major gains of abolition.

We submit that the Court should return to the original meaning of the Fourteenth Amendment. We grant, as *Plessy* implies, that termination of segregation is a break with tradition. But we contend that there is nothing in the tradition of Negro slavery

[64]For discussion of the policy bases of the reconstruction decisions, see 2 Warren, *The Supreme Court in United States History* 608 (1926). He lists three factors: the desire to eliminate "the Negro question" from national politics; the desire to relegate the Negroes to state authority; and the desire to restore confidence in the Court in the South. Our central position is that the Amendment should not have been sacrificed for any or all of these considerations.

that is worth preserving. The Thirteenth, Fourteenth and Fifteenth Amendments committed the country to the great experiment of making a complete break with that tradition. When Charles Sumner gave the abolitionists the formula of equality before the law, he did not mean equality with reservations, equality with segregation. Decisions such as *Plessy* v. *Ferguson* turn the Fourteenth Amendment into a phantom or a grotesque mistake. As Senator Frelinghuysen said in presenting the anti-segregation Civil Rights Bill of 1875 to the Senate:

> "If, sir, we have not the Constitutional right thus to legislate, then the people of this country have perpetrated a blunder amounting to a grim burlesque over which the world might laugh were it not that it is a blunder over which humanity would have occasion to mourn. Sir, we have the right, in the language of the Constitution, to give 'to all persons within the jurisdiction of the United States the equal protection of the laws'."[65]

This Court should return to the original purpose of the equal protection clause, to forbid distinctions because of race. State-enforced segregation is unconstitutional because it makes such a distinction. As Senator Edmunds put it, it is "slave doctrine" to make color and race reasons for distinctions among citizens. Segregation *is* discrimination. *Railroad Co.* v. *Brown, supra.*

II.

THE BASIC POLICIES UNDERLYING THE COURT'S APPROVAL OF SEGREGATION IN PLESSY V. FERGUSON HAVE, IN THE YEARS INTERVENING SINCE THAT DECISION, PROVED TO BE NOT ONLY WHOLLY ERRONEOUS BUT SERIOUSLY DESTRUCTIVE OF THE DEMOCRATIC PROCESS IN THE UNITED STATES.

If the meaning of equal protection, whether considered in terms of historic intent or of the ordinary meaning of words, is clearly incompatible with segregation, as we say it is, then the further task confronts us of assessing the underlying bases of *Plessy* v.

[65] 2 Cong. Rec. 3451, 43rd Cong., 1st Sess. (1874).

Ferguson. Concededly "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). This Court must deal with the same practical consideration that faced the Court in the nineteenth century. Petitioner, if he would persuade you to reconsider *Plessy*, must persuade you that Harlan's dissent had more than a theoretical validity.

Two fundamental judgments of fact and policy underlay the decision of the majority in *Plessy* v. *Ferguson*. One was the Court's acceptance of the premise that, since "[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences," it is impossible to eliminate segregation founded in the "usages, customs and traditions" of the community, and hence the Constitution must bow to the inevitable. The other was the Court's assumption that the wiser policy was to let events take their course and that governmental intervention "can only result in accentuating the difficulties of the present situation." 163 U.S. at 550-2.

Over half a century has passed since the Court decided *Plessy* v. *Ferguson*. In these years much that was obscure about the practice of segregation has become clarified. As events have unfolded, as trends have become more distinct, as additional knowledge has been gained, the impact of segregation upon American life has emerged more clearly. In the light of these intervening developments, the basic judgments made by the Court in *Plessy* v. *Ferguson* have proved to be erroneous. Indeed, far from solving or even alleviating the problem of racial segregation the decision of the Court has tended to intensify it and to create conditions that threaten to undermine the very structure of American democratic society.

1. The judgment of the Court in Plessy v. Ferguson that direct governmental intervention to eliminate segregation is ineffective to overcome the prevailing customs of the community has proved to be without foundation.

There are severe limitations, of course, upon the effectiveness of direct legal compulsion to wipe out the gap that exists between

American theory and certain American practices in race relations. But the fact is that the ideal of racial equality is a deeprooted moral and political conviction of the American people. Decisions of this Court upholding that conviction, therefore, cannot fail to have a profound and far reaching effect upon the constant struggle being waged between ideal and practice. And, conversely, a decision that fails to give support to that conviction must necessarily have important depressing and retarding consequences.

Experience has shown that this Court is not as impotent in the field of race relations as the majority in *Plessy* v. *Ferguson* assumed. On the contrary every decision of this Court against racial discrimination has made a significant contribution toward the achievement of racial equality.

Concrete evidence is available, for instance, that the decisions of this Court in the white primary cases have not only eliminated the institution of white primaries but have resulted in a substantial increase in Negro voting. V. O. Key, in his careful study entitled *Southern Politics*, reports that except in four states of the Deep South the decision in *Smith* v. *Allwright*, 321 U.S. 649 (1944), was accepted "more or less as a matter of course."[66] Pointing out that the effect of the decision was not felt until the 1946 primaries, he notes that "Florida experienced a sharp increase in Negro registration after 1944"; that "[i]n 1946 the voting status of Georgia Negroes changed radically," the number of Negro registrants rising to an estimated 110,000; and that in Texas, "with a few scattered local exceptions, Negroes voted without hindrance in the 1946 Democratic primaries."[67] Key reports that four states—South Carolina, Alabama, Mississippi and Georgia—made strenuous efforts to avoid the effect of the *Allwright* case, but that these efforts were quickly nullified by the courts in both South Carolina and Alabama. With respect to South Carolina he observes:

> "Negroes have encountered stubborn opposition to even a gradual admission to Democratic primaries in South Caro-

[66] Key, *Southern Politics* 625 (1949).
[67] *Id.* at 625, 519-521.

lina. The last vestige of the white primary was stricken down by court action in that state in 1948. Prior to that time virtually no Negroes voted in the primaries. About 35,000 are reported to have cast ballots in the 1948 primary."[68]

Thus it is clear that judicial decisions have been a powerful influence in assisting the Negro to obtain the right of franchise. The decision of this Court in *Morgan* v. *Virginia*, 328 U.S. 373 (1946), has made an important contribution to racial equality in the field of transportation.[69] And evidence was offered in the instant case showing that where segregation in the University of Maryland Law School was ended by judicial compulsion the subsequent experience was wholly satisfactory.[70]

That the majority in *Plessy* v. *Ferguson* greatly over-estimated the practical difficulties of eliminating segregation through governmental action is likewise apparent from the accumulation of evidence in recent years that discriminatory practices, long rooted in the "usages, customs and traditions" of the community, can be successfully eradicated. The President's Committee on Civil Rights, in one of the most significant findings of its well-documented report, concludes:

> "If reason and history were not enough to substantiate the argument against segregation; recent experiences further strengthen it. For these experiences demonstrate that segregation is an obstacle to establishing harmonious relationships among groups. They prove that where the artificial barriers that divide people and groups from one another are broken, tension and conflict begin to be replaced by cooperative effort and an environment in which civil rights can thrive."[71]

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[68] *Id.* at 522. For a full account of Negro voting and the white primary litigation, see *id.* at 517-22, 619-43. See also Murray (Ed.), *The Negro Handbook* 48-53 (1949). It has been estimated that the number of Negroes registered to vote in the South increased from 211,000 in 1940 to over 1,000,000 in 1948. *Id.* at 53.

[69] See, *e.g.*, *id.* at 64.

[70] R. 290. This evidence was excluded by the trial court.

[71] Report of President's Committee on Civil Rights, *To Secure These Rights* 82-3 (1947).

Specifically in the field of education I. E. Taylor, after noting the increase of Negro teachers in white colleges, observes:

> "Reports are coming in that Negro scholars are giving a good account of themselves, that their students are enthusiastic and open-minded, and that alumni and parents are taking the situation calmly."[72]

The elimination of segregation in public housing raises issues perhaps more difficult than those involved in its elimination from higher education. Yet Charles Abrams, one of the country's foremost authorities on housing, writes:

> "Where Negroes are integrated with whites into self-contained communities without segregation, reach daily contact with their co-tenants, are given the same privileges and share the same responsibilities, initial latent tensions tend to subside, differences become reconciled, cooperation ensues and an environment is created in which interracial harmony will be effected.
>
> "This conclusion is supported by many reports of housing authorities who have ventured into mixed occupancy."[73]

Experience with the abandonment of segregation in the armed services, again closely comparable with the situation in higher education, has been similar. The report of the President's Committee on Civil Rights cites an illustration involving Negro and white soldiers during the war:

> "The Negro soldiers were trained and organized into platoons, which were placed in regiments in eleven white combat divisions. For months the Negro and white men in these

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[72]Taylor, *Negro Teachers in White Colleges*, 65 School and Society 369 (1947).

[73]Abrams, *Race Bias in Housing* 22 (1947), pamphlet published jointly by American Civil Liberties Union, National Association for the Advancement of Colored People, and American Council on Race Relations. For other accounts of the successful elimination of segregation in housing see Ottley, *The Good-Neighbor Policy—At Home*, Common Ground, Summer 1942, p. 51; Manning and Phillips, *Negroes as Neighbors*, 13 Common Sense 134 (1944); Horne and Robinson, *Adult Educational Programs in Housing Projects with Negro Tenants*, 14 Jour. Negro Educ. 353 (1945); Abrams, *The Segregation Threat in Housing*, 7 Commentary 123 (1949); Report of President's Committee on Civil Rights, *To Secure These Rights* 85-7 (1947).

divisions worked and fought side by side. Then, white officers, noncommissioned officers, and enlisted men in seven of the eleven divisions were interviewed. At least two of these divisions were composed of men who were predominantly southern in background. It is surprising how little the response of these southern men varied from that of men from other parts of the country.

"Two out of every three white men admitted that at first they had been unfavorable to the idea of serving alongside colored platoons. Three out of every four said that their feelings toward the Negro soldiers had changed after serving with them in combat."[74]

Following up the recommendations of his Committee, President Truman in July, 1948, issued an Executive Order stating:

"It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin. This policy shall be put into effect as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale."[75]

Experience with governmental efforts to eliminate segregation in employment points consistently to the same conclusion. The Fair Employment Practice Committee, established during the war to promote equality of all races in employment, summarizes its experience of five years in its final report:

"Two fundamentally hopeful facts developed out of the Government's efforts to open war time opportunities to all workers:

"1. Employees and workers abandoned discrimination in most cases where Government intervened.

"2. Once the barriers were down, the workers of varying races and religions worked together efficiently and learned to accept each other without rancor."[76]

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[74] *Id.* at 83. With respect to the experience of the Merchant Marine the Report states: "Where there was contact with Negroes on an equal footing in a situation of mutual dependence and common effort prejudice declined." *Id.* at 85.

[75] Exec. Order 9981, Fed. Reg. 4313 (1948).

[76] U. S. Fair Employment Practice Committee, Final Report viii (1946). For discussion of FEPC experience in the South see *id.* at 33-6.

The history of state fair employment statutes shows the same results. Says a member of the New York State Commission Against Discrimination:

> "Critics of fair-employment laws used to claim that long-established habits of discrimination could not be changed by legislation. Their argument has been unmistakably answered today. Nearly four years experience in New York—and similar experience in New Jersey, Massachusetts, Connecticut, Washington, Oregon, New Mexico and Rhode Island, all of which have passed anti-discrimination legislation modeled after the New York law—indicates conclusively that wise legislation creates a climate of opinion in which discrimination tends to disappear."[77]

Where private management has seriously undertaken to eliminate discrimination in employment it has been successful. The American Management Association reports:

> "In the face of many objections to the use of Negro labor, there are the incontrovertible evidences of companies, large and small, which *are* hiring qualified Negroes for operations requiring varying levels of skill—and doing so with marked success . . . .
>
> "Many of the plants now making use of colored personnel have no previous history of Negro employment . . . . These plants are scattered all over the country . . . .
>
> "It is evident that, irrespective of a company's past history or its geographical location, Negro workers can be introduced into a plant, or their employment extended, provided management is sincerely desirous of taking this course."[78]

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[77]Simon, *Causes and Cure of Discrimination*, N. Y. Times, May 29, 1949, § 6, p. 10 at p. 35. Cf. Ross, *Tolerance by Law*, 195 Harper's Mag. 458 (1947): "Two years of state FEPC's have done more to end job discrimination than fifty years of private agitation, good-will conferences and educational campaigning." See also N. Y. State Commission Against Discrimination, *1948 Report of Progress* 11-12; Comment, 56 Yale L. J. 837 (1947); Northrup, *Proving Ground for Fair Employment*, 4 Commentary 552 (1947).

[78]American Management Association, *The Negro Worker* 9-11 (1942). Among many other accounts of successful integration of Negro and white workers see Commission on Discrimination in Employment, N. Y. State War Council, *Breaking Down the Color Line*, 32 Management Review 174 (1943); Newman, *An Experiment in Industrial Democracy*, 22 Opportunity 52 (1944); Gillmor

Thus our present day experience demonstrates that elimination of patterns of segregation is not only feasible but is rapidly going forward under government sponsorship. As the American Civil Liberties Union has pointed out in its most recent survey of the status of civil liberties in the United States, "race equality under law advances steadily."[79] And again, "[t]he gathering momentum of the many-sided movements to extend the rights of Negroes was expressed in numerous court cases, legislation, administrative rules, and liberalized policies in quasi-public organizations."[80] The assumption of the majority in *Plessy* v. *Ferguson* that strict enforcement of the Fourteenth Amendment in accordance with its original purposes could not be made effective by governmental action has simply not been borne out by the actual developments. It is in this new atmosphere of progress that this Court should now reconsider the issues raised by the instant case.

2. Patterns of segregation have not tended to produce harmonious relations between races, as the Court assumed in Plessy v. Ferguson, but have increased tensions and become progressively destructive of the democratic process in the United States.

It was the judgment of the majority in *Plessy* v. *Ferguson* that the institution of segregation was better left alone, that judicial intervention under the Fourteenth Amendment would accentuate the difficulties. Clearly implied was the notion that harmonious relations would gradually evolve by a process of mutual adjustment.

(president of Sperry Gyroscope Co.); *Can the Negro Hold His Job?*, National Association for the Advancement of Colored People Bulletin 3-4 (Sept. 1944); Ross, *They Did It In St. Louis*, 4 Commentary 9 (1947). With regard to the successful integration of Negro and white workers in labor unions see Bellson, *Labor Gains On the Coast*, 17 Opportunity 142 (1939); Sweetland, *The CIO and Negro American*, 20 Opportunity 292 (1942).

[79] American Civil Liberties Union, 29th Ann. Rep. *In the Shadow of Fear* 3 (1949).

[80] *Id.* at 29.

Mr. Justice Harlan, with remarkable insight, understood that the majority's hope could not be realized:

> "The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution . . . . The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?" (163 U.S. at 560).

Events have proved that Justice Harlan was right and the majority of the Court wrong.

The effects of segregation upon the group segregated have recently been summarized:

> "Every authority on psychology and sociology is agreed that the students subjected to discrimination and segregation are profoundly affected by this experience . . . . Experience with segregation of Negroes has shown that adjustments may take the form of acceptance, avoidance, direct hostility and aggression, and indirect or deflected hostility. In seeking self-expression and finding it blocked by the practices of a society accepting segregation, the child may express hatred or rage which in turn may result in a distortion of normal social behavior by the creation of the defense mechanism of secrecy. The effects of a dual school system force a sense of limitations upon the child, and destroy incentives, produce a sense of inferiority, give rise to mechanisms of escape in fantasy, and discourage racial self-appreciation."[81]

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[81] Note, 56 Yale L. J. 1059, 1061-2 (1947), citing numerous scientific authorities in support of the statement.

The consequences of segregation to the group that maintains the segregation have been described by Myrdal:

> "Segregation and discrimination have had material and moral effects on whites, too. Booker T. Washington's famous remark, that the white man could not hold the Negro in the gutter without getting in there himself, has been corroborated by many white Southern and Northern observers."[82]

The psychological and sociological data showing the effects of segregation upon both groups and the serious tensions it creates in the community at large have been presented to the Court in the Brief for the United States in *Henderson* v. *United States* (No. 25, October Term, 1949) as well as by petitioner in this case.[83] There is no need to review these materials here. The point we wish to emphasize is that a satisfactory adjustment between the races has not been achieved through governmental inaction toward segregation. On the contrary, the continued existence of segregation has perpetuated and strengthened the grave maladjustments inherent in the system.

Myrdal, one of the most discerning students of the problem, has pointed this out, noting that what was merely segregation forty years ago is becoming a caste system today:

> "The spiritual effects of segregation are accumulating with each new generation, continuously estranging the two groups."[84]

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[82] 1 Myrdal, *An American Dilemma* 643-4 (1944).

[83] The material is relevant as showing both that segregation necessarily implies the inferiority of the segregated group and that separate facilities can in fact never be equal. In addition to the two briefs referred to, see the studies cited in Note, 56 Yale L. J. 1059 (1947) and Note, 49 Col. L. Rev. 629 (1949). See also Wirth, *Segregation*, 13 Encyc. Soc. Sci. 643 (1934); American Council on Education, *Thus Be Their Destiny* (1941); American Council on Education, *Color, Class and Personality* (1942); Bowen, *Divine White Right* (1934); Note, 58 Yale L. J. 472 (1949).

[84] 1 Myrdal, *An American Dilemma* 645 (1944). See also *id.* at 644-50.

The process has recently been described by MacIver:

> "Now let us consider more clearly the manner in which the conditions that are confirmed or imposed by discrimination operate to sustain it. The discriminating group starts with an advantage. It has greater power, socially and politically, and usually it has a superior economic position. Thus it is enabled to discriminate. By discriminating it cuts the other group off from economic and social opportunities. The subordination of the lower group gives the upper group a new consciousness of its superiority. This psychological reinforcement of discrimination is in turn ratified by the factual evidences of inferiority that accompany the lack of opportunity, by the mean and miserable state of those who live and breed in poverty, who suffer constant frustration, who have no incentive to improve their lot, and who feel themselves to be outcasts of society. Thus discrimination evokes both attitudes and modes of life favorable to its perpetuation, not only in the upper group, but to a considerable extent, in the lower group as well. A total *upper caste complex*, congenial to discrimination, a complex of attitudes, interests, modes of living, and habits of power is developed and institutionalized, having as its counterpart a *lower caste complex* of modes of living, habits of subservience, and corresponding attitudes."[85]

Thus the problems created by segregation are not solved by themselves or by the natural processes of the community upon which it has fastened its hold. Quite the contrary, segregation tends to feed upon itself and grow increasingly malignant. It is truly a cancer in our society, progressively threatening the health and very life of democracy. The real nature of segregation was not grasped by the majority in *Plessy* v. *Ferguson*.

3. This Court has ultimate responsibility, under the Constitution, to review the factual and policy judgment of the Texas legislature in this situation.

The Texas Court of Civil Appeals held that it could not reconsider the legal merits of segregation as that topic was "outside the judicial function. The people of Texas, through their consti-

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[85] MacIver, *The More Perfect Union* 67-8 (1948).

tutional and legislative enactments, have determined that policy, the factual bases of which are not subjects of judicial review." R. 450.

This is wrong. Texas cannot turn into a matter of fact or of local judgment the expressed principle of the federal Constitution that the rights of citizens of the United States are not dependent upon race, creed, or color. No subject is more fit for judicial review, and strict judicial review, than conduct which strikes at the heart of the democratic process. Mr. Justice Stone, in *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153 (1938), suggests that close scrutiny is necessary in "the review of statutes directed at particular religious . . . or national . . . or racial minorities"; for the "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for correspondingly more searching judicial inquiry." And see *West Virginia State Bd.* v. *Barnett*, 319 U.S. 624, 638 (1943).

The institution of segregation is designed to maintain the Negro race in a position of inferiority. It drastically retards his educational, economic and political development and prevents him from exercising his rightful powers as a citizen. It creates maladjustments and tensions which sap the vitality of our society. Moreover, left to itself, it operates to strengthen and accentuate the very evils which need to be combatted. To this extent it is not subject to correction by the normal methods of the political process. On the other hand, judicial action to wipe out segregation has proved entirely practical and effective. In the light of these circumstances, not known to or recognized by the majority in *Plessy* v. *Ferguson*, the Court should not hesitate to strike down the practice as plainly violative of the Fourteenth Amendment's guarantee of equal protection.

III.

SEGREGATION SHOULD NOT BE EXTENDED TO EDUCATION.

1. The precedents do not uphold segregated education.

Plessy v. *Ferguson* involved segregation on common carriers and carefully did not endorse segregation generally. It was urged in argument that if segregation on carriers were valid, states might require white and colored persons to use different sides of the street, or paint their house or business signs different colors, on the ground that one side of the street or one color was as good as another. Such action, the Court said, would be invalid, holding that even segregation must be "reasonable." 163 U.S. at 550.

Though this Court has held that segregation of whites and Negroes in different blocks in a city is unreasonable, *Buchanan* v. *Warley*, 245 U.S. 60 (1917), it has never squarely faced the question whether segregation in education is unreasonable. If segregation laws are to be permitted in the casual affairs of life, such as riding on street-cars, but are to be invalidated when applied to such fundamental matters as establishing a home, the question becomes whether the undisputed right to equal education falls within the first category or the second.

This is not to say that the problem of the validity of segregation in education has never been referred to in the opinions of this Court, but rather that it has never been seriously argued or deliberately considered. In *Berea College* v. *Kentucky*, 211 U.S. 45 (1908), the issue was the validity of a Kentucky statute forbidding the teaching of Negroes and whites in the same college. The sole question raised and decided was that such a statute was not a violation of due process as an interference with the property rights of the educational corporation. The question of the rights of individuals was carefully put aside (*id.* at 54) and the equal protection problem was not involved. In *Cumming* v. *Richmond County Bd.*, 175 U.S. 528, 543 (1899), the Court in so many words excluded the legality of segregation in education from its decision. Yet in *Gong Lum* v. *Rice*, 275 U.S. 78 (1927),

the Court treated segregation in education as legitimate on the basis of the *Plessy* and *Cumming* cases despite the fact that the basic problem was not argued in the *Gong Lum* case and that it was neither involved in *Plessy* nor decided in *Cumming*.

The result is that if segregation in education is constitutional, it became so under a rule of law that came from no place. So vital a matter should not have rested on dicta without either argument or consideration. *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 344 (1938), did observe that segregated education had been "sustained by our decisions." But the cases cited had not in fact considered the precise point and that matter was not involved in the *Gaines* case, which decided only whether a particular type of separation in education was "equal." Nor does *Sipuel* v. *Bd. of Regents*, 332 U.S. 631, and 333 U.S. 147 (1948), add anything on this point.

2. Under the rule of reason created by the precedents, segregation is unreasonable.

If we accept arguendo the *Plessy* case, with its distinction between "reasonable" and "unreasonable" types of segregation, we must place segregated education in the category of the "unreasonable." Segregated transportation is at least of shorter duration, and it is fairly easy to determine whether the proffered alternatives in transportation are in fact equal. Segregated education has more severe consequences, with devastating psychological effects. Furthermore, in segregated education it is impossible in fact to secure or police that equality which *Plessy* assumes must exist. Fifty years of experience teaches that separate education virtually never is equal. As the President's Committee on Civil Rights reported:

> "With respect to education, as well as to other public services, the Committee believes that the 'separate but equal' rule has not been obeyed in practice. There is a marked difference in quality between the educational opportunities offered white children and Negro children in the separate schools."[86]

[86]Report of President's Committee on Civil Rights, *To Secure These Rights* 63 (1947).

Even beyond this, however, there is compelling reason—a reason which goes to the heart of democratic principles of education—for not extending *Plessy* v. *Ferguson* to the field of education. This may be briefly stated:

(1) A democratic society, like any other, seeks to transmit its cultural heritage, traditions and aspirations from generation to generation.[87] While there are many instruments for transmission of culture—the family, the church, business institutions, political and social groups and the schools[88]—in our society the school seems to have emerged as the most important.[89] This was to be expected from the fact that in a democracy citizens from every group, no matter what their social or economic status or their religious or ethnic origins, are expected to participate widely in the making of important public decisions. The public school, unlike the family and other narrower institutions, has thus become the logical agency for giving to all people that broad background of attitudes and skills which should enable them to function effectively as participants in a democracy.

Indeed, this consideration lay behind the whole movement for free compulsory public education. Thus Jefferson stated: "Even under the best forms [of government] those intrusted with power have, in time and by slow operations, perverted it into tyranny; and it is believed that the most effectual means of preventing this would be to illuminate, so far as practicable, the minds of the people at large . . . ."[90] Furthermore, Horace Mann and many others who fought for free public education valued it as an instrument for eliminating the class structure in education, namely the segregation of the rich from the poor, which bred undemocratic attitudes and habits of life. By the same token, opponents of free public education were frequently

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[87]Benedict, *Transmitting our Democratic Heritage in the Schools*, 48 Am. Jour. Sociol. 722 (1943), reprinted in Lee and Lee, *Social Problems in America* 297 (1949).

[88]Myers and Williams, *Education in a Democracy* 164-227 (1942).

[89]Merriam, *The Making of Citizens* 88-89, 211-2, 273-4 (1931).

[90]Quoted in Curti, *The Social Ideas of American Educators* 3 (1935).

those who believed in government by the elite and had little faith in the full development of democracy.[91]

(2) Just as the principle of free public education was the first important step in realizing democratic objectives through our educational system, so completely non-segregated public education is an essential element in reaching that goal. If children have race superiority taught them as infants, we cannot expect them lightly to toss it aside in later life. The answer lies not, however, in simply indoctrinating them with the principle of racial equality. Modern educational theory, formulated in answer to the need of our society for self-reliant individuals voluntarily cooperating with others to meet the everchanging scene in our dynamic civilization,[92] postulates a more thoroughgoing solution. According to this theory, education "is a continuous process from the beginning to the end of life", and it is a "continuous reconstruction of experience."[93] That is to say, each new thing learned is assimilated to some previous thing learned, and the new is in part conditioned by the old. "Education in America must be education for democracy. If education is life and growth, then it must be life within a social group . . . . Schools must be democratic communities wherein children live natural, democratic lives with their companions and grow into adulthood with good citizenship a part of their experience."[94]

(3) This modern educational theory of learning by doing, clearly implies the necessity of non-segregated education. The principle of equality of opportunity regardless of race or creed,

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[91] *Id.* at 101-200.

[92] See Benedict, *op. cit. supra* note 87; Kallen, *The Education of Free Men* cc. 10, 11, 12, 15 (1949); Kilpatrick (Ed.), *The Educational Frontier* c. 2 (1933); The President's Commission of Higher Education, 1 *Higher Education for American Democracy* 5-9, 101-2 (1947); 2 *id.* 3-9; *Brubacher, Modern Philosophies of Education* c. 14 (1939).

[93] Frasier and Armentrout, *An Introduction to Education* 31, 33 (3d ed. 1933).

[94] *Id.* at 32. See also Brubacher, *op. cit. supra* note 92 at 330-1; Dewey, *Democracy and Education* (1916); Mayo, *The Human Problems of an Industrial Civilization* (1933); Lewin, *Resolving Social Conflicts* c. 5 (1948).

so much a part of our American tradition, can be fully achieved only if this element in our cultural heritage is kept alive and allowed to grow. The school, as has been shown, is the most important institution through which this heritage can be transmitted. But, as has likewise been made clear, proper teaching of the principle of equality of opportunity requires more than mere inculcation of the democratic ideal. What is essential is the opportunity, at least in the school, to practice it. This requires that the school make possible continuous actual experience of harmonious cooperation between members of various ethnic and religious groups and thus produce attitudes of tolerance and mutual sharing that will continue in later life.[95] In the segregated school, this desirable environment does not exist. The most important instrument for teaching democracy to all people is thus rendered impotent.

Even for those who believe in the policy behind *Plessy* v. *Ferguson*, that it is impractical to eliminate segregation in all areas of our culture at once, education has usually been the logical step for achieving our ideal of true equality. Since segregated education cannot be effective education for equality, the principle of *Plessy* v. *Ferguson* should not be extended to the schools.

IV.

EQUAL FACILITIES FOR LEGAL EDUCATION HAVE NOT IN FACT BEEN OFFERED TO SWEATT AND, INDEED, SEGREGATED LEGAL EDUCATION CANNOT UNDER ANY CIRCUMSTANCES AFFORD EQUAL FACILITIES. HENCE PETITIONER HAS BEEN DENIED EQUAL PROTECTION EVEN WITHIN THE BROADEST APPLICATION OF PLESSY V. FERGUSON.

Up to this point we have challenged the legality of segregation generally, and particularly in education. But it is perhaps unnecessary to go so far. Petitioner wants to go to the University

[95] See Kallen, *The Education of Free Men* 182-4 *et passim* (1949); MacIver, *The More Perfect Union* c. 9 (1948); Newlon, *Education for Democracy in Our Time* 92-103 (1939).

of Texas Law School. The courts below have concluded that the segregated school is "separate but equal" and, therefore, legitimate. We contend that Texas has not in fact created a segregated law school for Negroes which is equal to its white law school, and indeed that it is impossible for a segregated law school to afford opportunities in legal education equal to an unsegregated school.

In making this argument, we are safely within the boundaries of all precedents, and *Plessy* v. *Ferguson* becomes our direct support. In any interpretation, that case requires equality if segregation is to be permitted, and we contend that there is not and could not possibly be equality here.

The precise point that segregated legal education affords equal education has never been decided by this Court. In the *Gaines* case, 305 U.S. 337 (1938), there was no legal education offered Negroes in Missouri, and the Court, therefore, was required to hold only, as it did hold, that equal facilities must be furnished within the borders of the State. In the *Sipuel* case, 332 U.S. 631 (1948), the majority found that the question whether "separate" legal education was or could be "equal" was not properly presented to it.

In the *Sipuel* case, further considered *sub nom. Fisher* v. *Hurst*, 333 U.S. 147, 152, Mr. Justice Rutledge disagreed with his brethren on the procedural issue, and thus reached the question we have here. Mr. Justice Rutledge observed that the equality required is "equality in fact, not in legal fiction. Obviously no separate law school could be established elsewhere overnight capable of giving petitioner a legal education equal to that afforded by the state's long, established and well-known state university law school."

Freed of the procedural barrier in the *Sipuel* case, we reach Mr. Justice Rutledge's point in this case. We contend that, if the equality required by the Fourteenth Amendment is "equality in fact, not in legal fiction," then clearly this over-night law school, suddenly appearing in Austin and quickly moved to Houston, does not and cannot equal the University of Texas (white).

Its lack of the attributes of equality is shown particularly by the testimony of former Dean Earl Harrison of the University of Pennsylvania Law School (R. 216-23) and Professor Malcolm Sharp of the University of Chicago Law School (R. 341-51).

Petitioner's right to a completely equal legal education is not met if at some future time some other Negro might be able to get equal education in Texas. The decisions establish that petitioner's right is "a personal one." *State of Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 351 (1938). "The equal protection clause of the United States Constitution does not refer to rights of the Negro race, the Caucasion race, or any other race, but to the rights of individuals." *Perez* v. *Sharp*, 32 Cal. 2d 711, 716, 198 P. 2d 17, 20 (1948). See also *McCabe* v. *Atchison, Topeka & Santa Fe*, 235 U.S. 151 (1914).

The application of this familiar principle means that Texas must give Sweatt the opportunity for education "in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group." *Sipuel* v. *Bd. of Regents*, 332 U.S. 631, 633 (1948). Sweatt cannot possibly obtain the equal education to which he is entitled in the special institution set up under the pressure of this case.

This judgment requires us to compare law schools, a very special kind of educational comparison. Grade schools and high schools perhaps can be compared on the basis of physical plant, or teachers' salaries, or types of plumbing, or number of students in the class, or variety of courses offered;[96] but these mechanical approaches to legal education tell only a partial story. The necessary inequality of Texas (colored) is accentuated by factors peculiar to legal education and the standards applicable to grade schools or high schools have little relevance in such comparison. Some of the inequalities in the instant case are also the product of the

[96] For a collection of cases decided for and against Negroes in terms of size of school, value of school property, location of school, length of term, number of teachers, etc., see 103 A.L.R. 713. For a similar approach by Texas in this case, see R. 78.

extremely small size of the school which Texas would require Sweatt to attend (R. 77).

(1) Faculty size is not the exclusive measure of a law school, certainly not where the number of teachers is reasonably large. But the size has great relevance when it is very small. Texas contemplates a faculty of only four at Texas (colored) (R. 454) but lists 28 faculty members for the current year at Texas (white).[97] Although fewer faculty members may be able to give fewer students at the Negro school a greater proportion of time, it will be the time of a jack-of-all-trades—not a specialist. Nor will the student have the benefit of the different faculty viewpoints so beneficial to the law student.

(2) Apart from the faculty size, faculty quality at Texas (colored) will not be equal. The primary and secondary school cases cited above compare teachers as so many interchangeable units of educational machinery. Assuming arguendo the validity of that approach to grade schools, law teachers are not thus fungible. Justice Jackson put it well when he said, "Nothing, not even an alluring new curriculum, can take the place of a sagacious and imaginative teacher. He can impart a sense of the movement and function of law which is needed as part of the study of each field of law."[98]

Very small schools lack the inducements of those somewhat larger to obtain professors of equal distinction. There is little possibility of encountering a number of interested and interesting students in so small a school. Hence, the range of educational experimentation desired by the able teacher is virtually non-existent. Development of the teacher's professional reputation turns upon his achievement of recognition as an authority in a special

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[97] Association of American Law Schools, *Teachers' Directory* 29 (1949-50). The number was 21 when this record was made (R. 369). The Bulletin of the Texas State University for Negroes, School of Law 4 (1949-50) lists six faculty members, including the librarian, at Texas (colored). It does not appear whether these are full-time or part-time faculty members.

[98] Jackson, *The Product of Our Present-Day Law Schools*, 9 Am. Law School Rev. 370, 375 (1939).

field. The small library and the elimination of an opportunity for sufficient specialization keeps the best prospective teachers——usually—from staying in the smallest schools if they go to them at all.[99] The University of Texas has many professors with names great in legal education. It is beyond belief that Texas (colored) can at any time in the predictable future acquire the services of their equals. Certainly it will not be done within a period of time meaningful to Sweatt.

(3) A minimal faculty results in minimal course offerings at the colored school. Well-staffed Texas (white) offered 75 courses for the two semesters of the current academic year; Texas (colored) can offer no such variety.[100]

(4) All these inequalities are accentuated by the lack of other facilities inevitably resulting from the exorbitant cost of attempting to furnish duplicate opportunities. This is well exemplified by differences in the library, the heart of the modern law school. The Austin School has 65,000 volumes of which 30,000 to 35,000 are non-duplicates (R. 455-6). Texas is obtaining for its colored school 10,000 volumes, the bare minimum permitted by the American Law School Association (R. 456).[101] On the basis of pre-war price standards it would cost the state of Texas something over $100,000 to obtain a library for the colored school equivalent in size to the non-duplicate list of the white school.[102] This is $100,000 which Texas shows no present intention of spending,

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[99]These problems are well discussed by Dean B. F. Boyer, University of Kansas City Law School, *The Smaller Law Schools*, 9 Am. Law School Rev. 1469 (1942).

[100]University of Texas Law School Catalogue 25 et seq. (Aug. 1, 1948). The Bulletin of the Texas State University for Negroes, *supra* note 97 at 14-17, lists 39 courses for the two semesters. In making this calculation we have taken the course headings, as listed in the catalogues, as constituting a "course."

[101]The Bulletin of the Texas State University for Negroes, *supra* note 97 at 5, states that the library of Texas (colored) now contains 23,000 volumes. The number of duplicates does not appear.

[102]The calculation is based on Moylan, *Selected List of Books for the Small Law School Library*, 9 Am. Law School Rev. 469 (1939), and the testimony of Hargraves, librarian of the University of Texas law school (R. 142).

and as a practical matter only a large staff of diligent librarians could find such a collection of books in any short time. Without such a library, the kind and quality of research experience given Sweatt will be far inferior to that given the white citizens of Texas.

(5) Texas (colored) gives its graduates an economic opportunity inferior to that of the graduates of the University at Austin. In addition to any economic difficulties Sweatt may meet as a Negro, he would acquire an unequal professional standing by graduation from a segregated law school. Professional careers are seriously affected by the repute in which the school is held by the profession at large. Moreover, Texas (colored) is a raw, new institution not only without prestige but without alumni. Texas thus deprives Sweatt of placement opportunities given to the graduates of the old, established school.[103] Assistance of this kind is most important in the present situation of the Texas bar for, in the words of the Assistant Dean of Texas (white): "It is obvious that the existing firms will not be able to absorb the great number of men being graduated from the law schools in Texas."[104] The placement efforts of Texas (white) based, as they must be, upon the loyalty of alumni and the established reputation of the institution emphasize the inequality of opportunity Texas would give Sweatt.

(6) Work on a law review is considered a desirable part of the training of good law students. The University at Austin has an excellent review on which its students may aspire to serve. Texas (colored) cannot have a law review for lack of a sufficient number of topnotch students to man it. (Cf. R. 105, 310-3, 347.)

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[103] Associate Dean James P. Gifford, Columbia University School of Law, in an extensive report on placement method observed, "Practically all schools use their alumni as sources of information about openings." 9 Am. Law School Rev. 1063, 1066 (1941). Dean Gifford also discussed the value of moot courts, dinners, and speeches as placement aids.

[104] 12 Texas Bar Journal 208 (1949).

(7) The training of moot court work depends in great measure on the quality of competition among groups of students. Moot court activities at Austin are based on such competition (R. 103). Substantial numbers are necessary to create satisfactory competitive groups.

(8) Finally, that part of a legal education which results from doing lawyer's work in a legal aid clinic requires for successful operation a sufficient number of competent students to manage and supervise the novices.[105]

And yet, if by some miracle Texas could surmount all these obstacles, it would still not create an equal opportunity for legal education. If it assembled a staff of the greatest teachers in America; if it spent a large sum to create an equal library; if it afforded equal placement opportunities for every graduate; if it overcame every other difficulty, Texas (colored) would still not be equal. For the segregated plan misses the whole purpose of a modern law school.

The lawyer, to meet the responsibilities of his profession, must have a vital sense of the culture of the community in which he lives and works. "Lawyers are perpetually engaged in trying to anticipate, prevent, mediate, settle or win human disagreements involving alleged rights recognized at law. Their thinking, planning and action are framed and limited by what they understand to be the prevailing principles and doctrines of law—what the judges, or legislatures have decided in like situations before or, more accurately, what they guess judges or legislatures would decide in like situations tomorrow."[106] The knowledge required for these tasks can in part be obtained from books; but a major share must come from intimate knowledge of the ways of thought of the community. "He (the lawyer) is literally lost unless he

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[105]For a description of the work of the Texas (white) legal aid program see Patterson, *The Legal Aid Clinic*, 21 Tex. L. Rev. 423, 426-9 (1943). The Bulletin of the Texas State University for Negroes, *supra* note 97 at 7, states that a legal aid clinic has been established at Texas (colored).

[106]Rostow, *Liberal Education and the Law: Preparing Lawyers for Their Work in Our Society*, 35 A.B.A. Jour. 626, 628 (1949).

can sense the drives, interests (and weaknesses) of those with whom he deals—whether as witnesses, negotiators, judges, clients, or opponents."[107]

Hence it is important that the lawyer receive his training in the group with which he is to live and to practice. In speaking of training in legal ethics, which is one part of this training process, Lloyd Garrison has observed:

> "Thus in classrooms, dormitories, clubs, and playing fields the student gets to know not a handful of neighborhood acquaintances but a cross-section of his contemporaries, drawn from innumerable localities and environments and varying widely in capacities and tastes. He will note them all, and in the activities and competition of the communal life he will perceive the various gradations of excellence which that life reveals in his fellows, and will desire increasingly to resemble those who stand out as the most admirable. In the same manner he will judge his teachers, and will be drawn slowly but certainly to those whose qualities of mind and character shine the most luminously."[108]

The student at Texas (white) will imbibe the lessons not only of character but of the knowledge of human beings from a far larger portion of that "cross-section of his contemporaries" than could any student at a segregated school. In classifying the students at the two schools by the test of color, Texas effectively eliminates much of the cross-fertilization of ideas. When a law student is forced to study and talk the shop talk of justice and equity with a segregated handful, he is circumscribed in the effort to achieve any real understanding of justice or equity. At Texas (colored) Sweatt will lose the opportunity of exchanging ideas with a complete variety of fellow students. He will thus lose part of the opportunity to absorb those received traditions of justice and fairness on which Texas law, like the rest of the Anglo-

[107] *Id.* at 629.

[108] Garrison, Address, American Bar Association Section on Legal Education, Boston, 1936, in 8 Am. Law School Rev. 592, 594 (1936).

American law, is based.[109] The attorney uncultivated in the traditions of justice and fairness is handicapped in advising clients or in dealing with attorneys and judges who are a part of the broad stream of Texas jurisprudence deepened as a result of the years of group association at the Austin school.

This lack of opportunity for full discussion with a group of completely divergent views has other and more technical aspects. Classes themselves must be large enough for presentation and discussion of divergencies. This does not mean that classes must be large in an absolute sense, but Texas (colored) cannot measure up for two reasons: (a) there must be at least enough students to make a sample large enough to include a few good ones; and (b) there must be in the group a divergency of points of view. The method of legal education depends entirely upon that thrust and parry of diverse ideas which cannot exist among a handful of segregated students.

If Texas denies Sweatt an education which is in fact completely equal, it also denies him an opportunity to develop the respect for law essential to the lawyer. Texas cannot make its colored school equal in the eyes of the law without contradicting plain facts. Were such a legal fiction adopted—were Sweatt compelled to live with such an assumption—he would be living falsely. Three years of such living must tend to deprive him of those attributes characteristic of the young lawyer fresh from school, "the humility and perspective, the courage and disinterestedness, the devotion to honest craftsmanship and, above all, the deep feeling that the government should serve all and serve justly."[110]

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[109] "The common law grew up as a taught tradition in the Inns of Court on the basis of the tradition of the courts. It was a taught tradition handed down from lawyer to apprentice from the seventeenth century and is now coming to be a taught tradition of academic law school." Pound, *Social Control Through Law* 50 (1942). See *Rules of the State Bar of Texas*, Art. 3, § 1, 1 Tex. Stat. 696 (Vernon 1947) and *Rule 1, Texas Rules of Civil Procedure* (Vernon 1942).

[110] Jackson, *The Product of Our Present-Day Law Schools*, 9 Am. Law School Rev. 370, 371 (1939).

To all these elements of inequality there must be added the considerations developed in earlier sections of this brief, and in other briefs filed with the Court—that segregated legal education, in common with every form of segregation, perverts and distorts the healthy development of human personality in the group subjected to such discrimination.

The inescapable inequality of Texas (colored) lies in the fact that legal education is not a mere matter of cubic feet of classroom space, or the possession of a few thousand books, or the presence of four lawyers recently become teachers. If, instead, legal education is something alive and vital, if the measure is not cubic feet of air space but the intellectual atmosphere within the walls, if law teachers are appraised as individual men of varying degrees of talent, if education is in large part association, if research and practice are part of the job of legal training, if segregation in law school warps and corrupts the mind and personality of man—if any of these things is true, then certainly this Texas Negro institution is a mockery of legal education and of the equal protection of the laws.

CONCLUSION.

Every branch of the government, in its own way, has the duty of meeting a challenge of our times that Democracy is unreal, a promise without fulfillment. This requires more than words. It requires that we bring our practices up to our pretensions. The account by General Bedell Smith of his experiences as Ambassador to Russia, as reprinted in the *New York Times*, dealt at some length with the publication *Amerika*, which our country distributes in Russia. In the *Times* General Smith reprinted two pictures from *Amerika* as samples of our message to Moscow. One of those pictures was of an unsegregated school room. Is this *really* our message to the world, or must we send a postscript that there is a special exception for young men studying the Constitution of the United States in the State of Texas? The Texas legislature has no authority to answer that question for the rest of America. The equal protection clause has answered it.

We respectfully submit that the judgment below should be reversed.

THOMAS I. EMERSON
JOHN P. FRANK
ALEXANDER H. FREY
ERWIN N. GRISWOLD
ROBERT HALE
HAROLD HAVIGHURST
EDWARD LEVI

FOR THE COMMITTEE OF LAW TEACHERS AGAINST SEGREGATION IN LEGAL EDUCATION

January, 1950.

APPENDIX A.

The Committee of Law Teachers Against Segregation in Legal Education was formed for the purpose of expressing the conviction of many law teachers that segregation in legal education is unconstitutional. The members of the Committee support the general legal positions taken in this brief, but responsibility for the detailed argument rests exclusively with the signers. The members of the Committee are as follows:

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Carl Auerbach, Madison, Wis.
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Boris I. Bittker, New Haven, Conn.
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A. Mercer Daniel, Washington, D. C.
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Allison Dunham, New York, N. Y.
Edgar N. Durfee, Ann Arbor, Mich.
Richard W. Effland, Madison, Wis.
Mortimer Eisner, Newark, N. J.
Thomas I. Emerson, New Haven, Conn.
Samuel D. Estep, Ann Arbor, Mich.
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Hugh J. Fegan, Washington, D. C.
Nathan P. Feinsinger, Madison, Wis.
Richard H. Field, Cambridge, Mass.
Vincent E. Fiordalisi, Newark, N. J.
Justin H. Folkerth, Columbus, Ohio
Henry H. Foster, Norman, Okla.
John P. Frank, New Haven, Conn.
Mitchell Franklin, New Orleans, La.
Harrop A. Freeman, Ithaca, N. Y.
Alexander H. Frey, Philadelphia, Pa.
Ralph F. Fuchs, Bloomington, Ind.
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Alfred L. Gausewitz, Albuquerque, N. M.
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Joseph W. Hawley, Seattle, Wash.
Paul R. Hays New York, N. Y.
C. Willard Heckel, Newark, N. J.
Samuel M. Hesson, Albany, N. Y.
Elmer E. Hilpert, St. Louis, Mo.
John O. Honnold, Philadelphia, Pa.
Harvey S. Hoshour, Albuquerque, N. M.
Leo A. Huard, Washington, D. C.
Robert M. Hunter, Columbus, Ohio.
J. Willard Hurst, Madison, Wis.
Jacob D. Hyman, Buffalo, N. Y.
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David Stoffer, Newark, N. J.
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David Watts, Cambridge, Mass.
Marshman S. Wattson, Bloomington, Ind.
Henry Weihofen, Albuquerque, N. M.
W. Willard Wirtz, Chicago, Ill.
Donald Wollett, Seattle, Wash.
L. Hart Wright, Ann Arbor, Mich.